

JANUARY 7, 1769.

# A N S W E R S

F O R



JAMES COULTER, Merchant in *Glasgow*, and others;

T O T H E

PETITION of Messieurs CLAY and MIDGLEY, Merchants in *Liverpool*, and GEORGE BROWN, Merchant in *Glasgow*, their Attorney.

**I**N September 1761, Anthony Mackinrick and Company, Merchants in *Virginia*, intending to consign twenty Hogheads of Tobacco to the Petitioners, Messieurs Clay and Midgley, wrote them the following Letter of Advice:—  
“Gentlemen, We intend to ship twenty Hogheads of Tobacco, in the *Two Sisters*, Captain Pollard, which will be consigned you. We beg you’ll get that Quantity insured for us, on receipt of this, at eight Guineas per Hoghead. This you’ll take care to do immediately, as we don’t chuse to run Risks. We don’t know what Time he will sail, but when he does, we will write you by him. We are,  
“&c.”

A

In



In Pursuance of this Intention, twenty Hogsheds of Tobacco were shipped on board this Vessel upon the 23d of November 1761, as consigned to the said Messieurs Clay and Midgley.

Upon the 22d of December thereafter, the Petitioners wrote to Messieurs Buchanan and Simpson, Merchants in Glasgow, desiring them to get an Insurance made for sixty-five Hogsheds Tobacco, shipped by sundries on board the said Ship, as Interest might appear for the sundry Accounts, as *per* initial Marks: And, amongst the Tobacco so desired to be insured, the twenty Hogsheds shipped by Mackittrick and Company, valued at 168 *l.* and marked A. M' K. and Co. were particularly mentioned.

In consequence of these Instructions, an Insurance was accordingly made, and 168 *l.* as the Value of the twenty Hogsheds, was underwrote for as follows: 60 *l.* by John Shortridge, 50 *l.* by James Coulter, and 50 *l.* by Thomas Scott, for A. Gray, by a Policy in favours of the said Messieurs Buchanan and Simpson, or whoever it concerns, as Interest may appear, as *per* initial Marks.

The Ship, in her Passage to *Liverpool*, was taken by a French Privateer, on the 8th of February 1762, and carried into *St. Maloes*.

The Petitioners, soon after the Ship was taken, made a Demand for the Sum underwrote upon the said twenty Hogsheds of Tobacco, as Creditors of Mackittrick and Company, for the Balance of 195 *l.* 12 *s.* 3 *d.* conform to an Account-current. This Demand was made upon the Footing, that the Tobacco was intended for their Payment, and that, in the Event of its having arrived safe, no other Creditor, nor even Mackittrick and Company themselves, could have prevented them from applying it to their own Payment.

To instruct this Claim, there was produced to the Underwriters the Bill of Loading, with the Oath of the Captain, declaring the Ship's being taken; and that the 20 Hogsheds were



were shipt on the proper Account of *Anthony Mackittrick* and Company; as also an Affidavit by *Thomas Midgley*, swearing to the Veracity of the Account-current, and that the Sum which was insured on the 20 Hogsheads of Tobacco from *Virginia* to *Liverpool*, was for, and on the proper Account and Risk of *Anthony Mackittrick* and Company.

Messieurs *Coulter* and *Shortridge*, being Creditors to *Mackittrick* and Company, in greater Sums than what had been underwrote by them, did, upon discovering that the Tobacco belonged to that Company, think themselves well entitled to retain in their own Hands; and therefore refused to make Payment to the Petitioners of the Sums due by the Policy; and Arrestments were likewise used in their Hands, and in the Hands of Mr. *Gray*, the other Underwriter, at the Instance of Messieurs *Johnston* and Company, who are Creditors to *Mackittrick* and Company in a very large Sum.

The Consequence of this was, mutual Processes, one at the Instance of Messieurs *Clay* and *Midgley*, the Petitioners, and their Factor, against the Underwriters; and the other, a Process of Multiple-poining, brought by these Underwriters, in order that it might be determined who had the preferable Right.

The Process at the Instance of the Petitioners came before the Lord *Hailles*, Ordinary, who, on the 20th of *January* last, decerned in Absence, in terms of the Libel. But this Decreet was thereafter stopt upon a Representation; and the Process of Multiple-poining having been likewise remitted to his Lordship, he was pleased, upon the 26th of *February* last, to pronounce an Interlocutor in the following Terms:  
 “ Decerns, conform to the Conclusion of the Libel at the Instance of Messieurs *Clay* and *Midgley*, and their Factor, and  
 “ prefers them in the Multiple-poining, *primo loco*, for ought  
 “ yet seen; and decerns in the Preference, and for Payment,  
 “ accordingly.” And to this Interlocutor his Lordship adhered,



hered, upon the 9th and 26th of *July*, and 9th of *August* last.

Against these Judgments of the Lord Ordinary, a Petition was preferred, and upon the 29th of *November* last, your Lordships pronounced the following Interlocutor: "The  
" Lords having heard this Petition, with the Answers there-  
" to, they prefer the Petitioners, and remit to the Lord Or-  
" dinary to proceed in the Cause accordingly."

Messrs. *Clay* and *Midgley* have now reclaimed in their turn, and your Lordships having appointed their Petition to be answered, the Respondents are now to offer a few Observations upon it.

It cannot be disputed, that Goods which are consigned by a Merchant in one Country to his Correspondent in another Country, to be sold by the latter, upon Commission, remain upon the Risk of the Consigner, not only from the Time of their being shipped, till their Arrival at the destined Port, but even after their coming into the Custody of the Person to whom they are consigned. It is true, indeed, that if any Damage occur through the Fault of the Consignee, he will be answerable for it; but every accidental Loss, which could not be prevented by an ordinary Degree of Care and Attention, must fall upon the Consigner alone.

This proceeds upon the just Principle, That every thing perishes to its proper Owner, and shews, to Demonstration, that the Property still remains with the Consigner. Indeed, it is absurd to suppose, that the mere Act of Consignment should transfer the Property to the Consignee. And so far is this from being the Case, that, until the Goods are actually disposed of by him, they remain under the absolute Disposal of the Consigner, who may either order them to be returned to himself, or delivered to any Person whom he thinks proper to appoint to receive them.

When Matters are viewed in this plain and simple Light, it is difficult to discover upon what Ground Messieurs *Clay*  
and



and *Midgley* can pretend to compete with the Respondents in the present Question. Had the Vessel, containing the Tobacco of *Mackittrick* and Company, arrived in any of the Ports of this Kingdom, it must have been competent for the Creditors of that Company to have arrested these Tobacco's; and it would have been in vain for Messieurs *Clay* and *Midgley* to have pretended a preferable Right, as Consignees, over such Arresters. They could not claim a Right of Property in the Goods so arrested; they could only appear in the Character of Factors for the Common-debitors, and could not prevent the Diligence of Creditors from taking place, more than the Debtors themselves could do.

Nay, considering Messieurs *Clay* and *Midgley* in the Light of common Consignees or Factors only, and not as Creditors of *Mackittrick* and Company; it must also be admitted, that, according to the Idea of the Laws of this Country, the Tobacco's could have been effectually attached by the Creditors of *Mackittrick* and Company, even after they had come into the Possession of the Consignees, upon this simple Idea, that, notwithstanding the Consignment, they still remained the Property of the Consigner.

If the Respondents are well founded in the Doctrine hitherto maintained by them, it must necessarily follow, that the Sums which the Underwriters became bound to pay, in the Event of the Ship's being lost or taken, must be equally liable to the Diligence of the Creditors of *Mackittrick* and Company, to whom the Goods that were insured belonged. The Property of the Goods was effectually lost by the Capture; but as, from that Moment, an Obligation arose against the Underwriters, to pay the Sums annexed to their Subscriptions to the Policy, they became Debtors to that Extent; not to Messieurs *Clay* and *Midgley*, nor to Messieurs *Buchanan* and *Simpson*, both of whom acted only for the Behoof of *Mackittrick* and Company, but to *Mackittrick* and Company themselves, who were the Proprietors of the Goods; and, that

B

being



being the Case, it must have been competent to the Creditors of *Mackittrick* and Company to affect the Debts so due to that Company, by using Arrestments in the Hands of the Underwriters, in the same Manner as they might have arrested the Goods themselves, had they arrived safe in Port ; and it must also have been competent to the Underwriters to compensate the Debts so created against them, by any other liquid Debts due to them by *Mackittrick* and Company.

The Petitioners seem to be sensible, that their Character of Consignees, in the ordinary Acceptation of the Word, will not be sufficient to intitle them to a Preference to the Sums in question. But then they alledge, that *Mackittrick* and Company had, in *September* 1760, commissioned from them a Parcel of Goods of the Manufactory of *Great Britain* ; that, in return for these Goods, they, some time thereafter, received one Consignment of Tobacco, to the Amount of 85 *l.* 7 *s.* 9 *d.* and another to the Amount of 41 *l.* 9 *s.* 10 *d.* and that, as they still continued Creditors to *Mackittrick* and Company, in a considerable Balance, the 20 Hogheads of Tobacco in question; shipped on board *the Two Sisters*, were consigned to them in Payment of this Balance ; and upon this State of Facts they contend, that the Consignment being made for Reimbursement of the Money which they were in advance to *Mackittrick* and Company, they would have had a preferable Right to this Tobacco, in the Event of its safe Arrival, and must, of consequence, have a like preferable Right to the Sums in the Hands of the Underwriters, which have now come in its Place.

But, in answer to this, the Respondents must, in the *first place*, observe, that there is no Evidence of the Fact upon which the Argument is built, *viz.* that these Tobacco's were purposely consigned to Messieurs *Clay* and *Midgley*, in order to reimburse them for the Sums due by *Mackittrick* and Company to them.—No such Thing appears from the Letter produced in Process, ordering the Insurance ; on the contrary, it would  
from



from thence appear, that they were consigned for the sole Behoof of the Consigners, in the ordinary Course of Trade; and Mr. *Midgley* has himself acknowledged, in his Affidavit, that the Insurance was made for, and on the proper Account and Risk of the Consigners.

The Petitioners are indeed pleased to alledge, that another Letter was sent along with the Ship, inclosing an Invoice and Bill of Loading, and expressly mentioning, that the Consignment was made, with an Intention, that the Proceeds thereof, or, in case of Loss, the Money recovered for the Insurance should be applied in Payment of their Debt; but that this Letter, together with the Bill of Loading, and Invoice inclosed in it, were carried off with the Ship itself, and have not been since recovered.

The Petitioners, however, cannot expect, that their bare Averment is to be taken for Evidence; and, as this Letter, said to have been sent along with the Ship, has never made its Appearance, there is no Proof that it ever existed, far less that it was of the Contents which they attribute to it; they say, indeed, that if the Production of that Letter should appear of any Consequence, it is very likely a Copy of it might be found in *Mackittrick* and Company's Copy-book of Letters, in the Hands of their Trustees in *Virginia*. But, when it is considered, that this Vessel, *the Two Sisters*, was carried into *S. Maloes*, as early as *February* 1762, that the Underwriters, from the Beginning, refused to pay the Sums underwrote by them; that the Petitioners, as far back as *June* 1765 were obtaining Affidavits from *Mackittrick* relative to this Affair, and that they have even of late been making new Investigations, and seeking new Evidence from the Books of *Mackittrick* and Company, which they have only produced, alongst with their present Petition, your Lordships cannot entertain a Doubt, that, if a Copy of any such Letter could have been found in the Letter-book of that Company, it would



would have made its Appearance in Process long ere now, supported by an Affidavit, to prove its Authenticity.

The Petitioners, it is true, appeal to a Letter, wrote by *Ebenezer Macharg*, one of *Mackittrick's* Partners, upon the 17th of *May* 1763, to an Affidavit of *Mackittrick*, emitted upon the 12th of *June* 1765; and to another Affidavit, by *Charles Yeats* and *Henry Mitchell*, bearing, that an Account thereto prefixed, in which the Petitioners are debited with 20 Hogheads of Tobacco, shipped in *the Two Sisters*, is a true Copy of their Account, as ingrossed in the Books of *Mackittrick* and Company, and that the Article relative to the said Tobacco is entered in the proper Hand-writing of Mr. *Mackittrick*.

But the Letter from *Ebenezer Macharg*, and the Affidavit of *Mackittrick*, obtained *ex post facto*, after the present Dispute arose, cannot be held as Evidence; besides, neither in the Letter, nor the Affidavit, is it so much as said, that *Mackittrick* and Company at any Time informed the Petitioners, that the Tobacco's in question were consigned to them in Payment of their Debt; Mr. *Macharg*, in his Letter, only says, that he was sensible it was intended as a Payment, and Mr. *Mackittrick's* Affidavit only bears, " That it was his Intention, " that the Proceeds of the said 20 Hogheads of Tobacco, " or, in case of Loss, the Money recovered for Insurance " should be applied to the said Company's Credit, with the " said *Clay* and *Midgley*, and that it will appear by the Company's Books of Account, in the Hands of the Trustees to " their Estate, that they, the said *Clay* and *Midgley*, are credited " with the Merchandize received from them, and debited " with the 20 Hogheads of Tobacco, shipped, as afore- " said."

Neither can the new Affidavit produced, be of any Avail, as nothing else appears from it, but that the Tobacco's were stated in the Books of *Mackittrick* and Company, to the Debit of Messieurs *Clay* and *Midgley*. This however was



was no more, than what is always done in every Consignment. The Goods sent from one Port to another, fell necessarily to be put to the Debit of the Persons to whom they are consigned, without distinguishing, whether such Persons are Creditors or Debtors to the Consigners. In short, the Petitioners have been able to produce no Evidence whatever, to shew, that they are in a better Situation than any other Consignees or Factors, to whom Goods are sent to be disposed of for Behoof of the Consigner.

In the *next Place*, even supposing it fully proved, that *Mackittrick* and Company intended, that the Proceeds of the Tobacco, or, in case of a Loss, the Money recovered for Insurance, should be applied in Payment of the Debt that was due to Messieurs *Clay* and *Midgley*, and had wrote them particularly to that Effect, it would be of no Avail to these Gentlemen; for, however clear that Intention might be, yet, if proper Measures were not taken, for carrying it into Execution, it could have no Effect. The Law has required certain Forms to be used in the Transmission of Property, whether for a Price instantly advanced, or in Payment of a former Debt, and, unless these Forms are observed, nothing is done, the Property of the Goods intended to be conveyed, remains with the original Owner, and must, of consequence, be still subject to the Diligence of such Owners lawful Creditors. Had it appeared from proper Evidence, that these Tobacco's were truly destined for Payment of the Debt due by Messieurs *Clay* and *Midgley*, and, had the Tobacco's themselves been delivered to them, they perhaps might have founded upon a compleat Conveyance, which would have been an effectual Bar to the Diligence of other Creditors; and it may likewise be true, that, if they had actually recovered the Money, which is the Subject of the present Question, from the Underwriters they would have been equally secure; but, as neither the Goods themselves, nor the Money underwrote upon them, did ever come into their Possession, they can



have no Title of Preference whatever. The Insurance was made in name of Messieurs *Buchanan* and *Simpson*, or whoever it concerns, as Interest may appear; *Mackittrick* and Company could have recovered the Money from the Underwriters, even in opposition to Messieurs *Clay* and *Midgley*, in the same Manner, as they could have recalled the Consignment of the Goods to these Gentlemen, and ordered them to be delivered to any other Person; and, if that be so, there cannot be a Doubt, that the Creditors of *Mackittrick* and Company were intitled to arrest the Debt due by the Underwriters, to the Exclusion of *Clay* and *Midgley*. The unexecuted Appropriation of the Goods, or of the Money to be recovered for Insurance, can never compete with compleat legal Diligence.

The Respondents think it unnecessary, to quote Authorities, in support of a Doctrine, which seems to them to be so clearly founded in the very first Principles of Law; they shall, however, take the Liberty, to mention two or three Cases, which appear to be perfectly similar.

The Creditor in a Bill, having given Orders to his Trustee, to whom it was indorsed, to pay a Part of the Money to a third Party, his Creditor, the Lords, notwithstanding the Order, found the Property of the Money remained with him who sent the Advice, and therefore might be arrested by his Creditors, 21st July 1697, *Inglis contra Clark*. And the same Judgment was pronounced upon the 16th of January 1706, Lord *Ross contra Gray*.—In these Cases, there was the clearest Intention, upon the Part of the Debitor, to apply his Subject to Payment of a Creditor; but, as he did not take the effectual Method to divest himself of the Property of these Subjects, they were found to be still arrestable; and, therefore, as *Mackittrick* and Company remained Proprietors of the Tobacco, notwithstanding the intended Consignment to Messieurs *Clay* and *Midgley*; and, as such, are, at this Day, Creditors



ditors in the Sums due by the Insurers, these Sums must be subject to the Diligence of their Creditors.

Another Case, similar to the present, is to be found in the late Collection of remarkable Decisions, and is there stated in the following Words: "*Auchterlony*, before absconding for Debt, made a List of his Bills, which he indorsed blank, and sent the whole in a Letter to *Spence*, his Father-in-law, bearing, that he had sent the Bills to him for the Use of his Creditors. After the Bills came into *Spence's* Hands, but before any Meeting with the Creditors, several of these Creditors, taking the Start, laid Arrestments in the Hands of the Acceptors to these Bills. In a Competition, the other Creditors craved to be preferred, as the Bills were delivered to *Spence*, their Trustee, before the Date of the Arrestments. The Arresters yielded, that a Bill, indorsed blank, delivered to a Man for his own Behoof, becomes his Property, because, by such Delivery, he is empowered to fill up the Indorsation in his own Name; but they contended, that *Spence* was Trustee for *Auchterlony*, not his Creditors; that the Bills remained still under the Power of *Auchterlony*, since they were not delivered to his Creditors, or to a Trustee for his Creditors; and therefore the Bills, as *Auchterlony's* Property, were regularly affected by the Arrestments;" and your Lordships accordingly preferred the Arresters. November 1732, Creditors of *Auchterlony* competing.

Another Case is likewise to be found in the Collection, equally applicable to the present Question. In the Year 1737, Sir *James Rothead* made a Settlement of his Estate, heritable and moveable, upon certain Persons, as Trustees for Behoof of his Heirs therein named. *Hugh Murray*, the only accepting Trustee, did, in December 1737, confirm the Moveables; and, not having Leisure to execute the Office of Executor, he granted a Factory to *George Gordon*, Writer in *Edinburgh*, to uplift the moveable Debts, grant Discharges, and to account  
to



to him for his Intromissions. In *September* 1740, Mr. *Murray* and *George Gordon* instituted an Account upon the Subject of the Factory, by which *George Gordon* came to be Debitor to his Constituent in the Sum of 286 *l. Sterling*, for which he granted Bill, of even Date with the fitted Account, payable to Mr. *Murray* or Order, and bearing Value received; and, of the same Date, got a full Discharge from Mr. *Murray* of his Factory, and all Obligations arising therefrom. In *March* 1741, Mr. *Murray* being about to leave the Town, and apprehending that a Demand might be made upon him by the next of Kin to Sir *James Rothead*, for the Balance in his Hands, for which they had obtained a Decree against him, as Sir *James's* Executor, he lodged, in the Hands of *Andrew Chalmer*, his first Clerk and ordinary Doer, *George Gordon's* Bill, indorsed blank, with a further Sum in Money, to answer the said Demand, and took from him a Declaration in the following Terms: " I *Andrew Chalmer*, Writer in *Edinburgh*, grant that Mr. *Hugh Murray*, Advocate, has indorsed to me *George Gordon's* Bill to him for 286 *l. Sterling*, and given me in Cash 123 *l. Sterling*, with which two Sums I am to pay the Sum he is decerned to pay to the nearest Kin of Sir *James Rothead*, and to report him their Discharge." Sir *James Rothead's* next of Kin not having made a Demand, the Money and Bill remained with Mr. *Chalmer* till Mr. *Murray* died in a State of Bankruptcy, when his Creditors proceeded to Diligence, and took out a Confirmation and, among other Moveables, gave up in Inventory the Bill and Cash in the Hands of Mr. *Chalmer*.

Sir *James Rothead's* next of Kin appeared for their Interest, and claimed Preference before Mr. *Murray's* Creditors, upon this Medium, that the Bill and Cash in the Hands of Mr. *Chalmer* were Subjects specially destinated by Mr. *Murray* for their Payment; and the Court found, " That, notwithstanding that the Money was lodged in the Hands of Mr. *Chalmer*, under the Declaration granted by him, it remained

" under



“ under the Power of Mr. *Murray*, and might have been called  
 “ for by him, till actual Application, and applied to what  
 “ Use he pleased; and, therefore, that the same remained in  
 “ *bonis* of Mr. *Murray*, and that Sir *James Rothead*'s next of  
 “ Kin have no Preference.” January 4th 1744, Sir *John*  
*Baird*, contra Creditors of Mr. *Hugh Murray*.

It is unnecessary to make any Comment upon these Decisions: The Destination of the Subject of Competition was in each Case perfectly clear and evident; but as the Property thereof remained still with the Common-debitor, his arresting Creditors were justly found preferable. And, as the Property of the Tobacco in question remained with *Mackittrick* and Company, notwithstanding the Consignment to Messieurs *Clay* and *Midgley*, the same Rule will fall to be followed in the present Case.

The Petitioners seem to be much puzzled to find out a Principle upon which they can establish a Preference to themselves, consistently with admitting, that the Cargo in question did, notwithstanding the Consignment, remain the Property of *Mackittrick* and Company. They contend, that different Persons may have different Interests in the very same Subject; that, although the Cargo in question remained, in the mercantile Language, upon the Account and Risk of *Mackittrick* and Company, yet, by the Custom of Merchants, Goods consigned, are said to be on the proper *Account* and *Risk* of the Shipper, in so far as he runs the Risk of them, in the Event of his not having ordered Insurance, or in so far as he runs the Risk of a falling Market; and that, on the other hand, the Shipper has the Benefit of a rising Market, while, at the same Time, in some Cases, he so far divests himself of all Interest in the Cargo, in favour of his Creditors, as not to have it in his Power, thereafter, to recal the Consignment; and from thence they conclude, that, in the mercantile Language, the Words *Account* and *Risk*, do not imply *absolute* Pro-



perty, but, on the contrary, are limited in many circumstance Cases.

The Respondents must confess, that they are at a loss to understand, perfectly, the Meaning of this Argument. They have no Apprehension, how the same Thing can be the Property of two different Persons at once. It is admitted, that the Tobacco must have been upon the Risk of *Mackittrick* and Company, until it arrived at its Port of Destination; during that Time, therefore, it was most undoubtedly the Property of that Company. But the Matter does not rest here; the Respondents are advised, that, though it had arrived safely into the Custody of the Petitioners, it would, nevertheless, have remained upon the Risk of the Consigners, and that they alone would have suffered the Loss, if it had perished by Fire, or other Accident, while in the Possession of the Petitioners, for this good Reason, that it still remained the absolute Property of these Consigners. It is true, indeed, that, upon the Supposition of the Petitioners being Creditors to *Mackittrick* and Company, they could have retained the Tobacco after it once came into their Hands, or its Produce, both from *Mackittrick* and Company, and their other Creditors, until they should be paid of the Debt due to them: But as a Right of Retention is inconsistent with a Right of Property, so it is certain, that, until the Tobacco should come into their Hands, no such Right of Retention could arise; and, of consequence, it must follow, that, in the *interim*, the Tobacco must have remained liable to the Attachment of any of the other Creditors.

Nor can the Petitioners maintain, that, by making the Insurance, they had acquired any stronger Right to the Sums insured, than they would have had to the Tobaccos, if they had arrived safe in *Port-Glasgow*, or any other Port at a Distance from them, and had been arrested before they could obtain the Possession. The insured Sums coming in place of the Goods, became the Property of *Mackittrick* and Company, equally with the Goods themselves, and the Petitioners could have



Have no further Interest in the one, than they could have had in the other. If, indeed, they had received Payment from the Underwriters, they might have insisted in their Plea of Retention; but, while these insured Sums remained unpaid, in the Hands of the Underwriters, they must have been subject, as being the Property of *Mackittrick and Company*, to the Diligence of the other Creditors of that Company.

The Petitioners, indeed, in p. 15th, insinuate, that the Insurance was made in their own Name, by Means of a Premium given by them to the Underwriters; but this is a most egregious Mistake: The Policy was made out solely in the Name of *Buchanan and Simpson, or whoever it concerns, as Interest may appear*, the known Meaning of which Words is, " whoever shall appear to have had the Property of the Goods, " when Documents are produced." The Policy was, therefore, only actionable at the Instance of *Buchanan or Simpson*, or the Person who would have been the Loser, if no Policy had been ordered, and it will not be denied, that, in that Case, the Loss would have fallen solely upon *Mackittrick and Company*. Indeed, if the Policy had been simply in Name of *Clay and Midgley*, they could never have recovered a Shilling of the Loss, because the Bill of Lading would have shown the Property to be in quite different Persons; and, as to what is said of the Premium being paid to them, the Fact is, that no Premium has hitherto been paid, either by them, or by *Buchanan and Simpson*; for, although every Policy grants a Receipt of the Premium as instantly advanced, yet, in reality, it is not paid to the Broker, till six or twelve Months thereafter, and when a Loss happens, it is never paid, but is allowed to the Underwriters at settling Accounts upon the Policy.

It will also occur to your Lordships, that if the Underwriters had failed, after the Insurance was made, the Loss thence arising would not have fallen upon the Petitioners, but upon *Mackittrick and Company*, so that the Petitioners, in  
any



any View of the Case, can have no more Right to insist for a Preference upon the insured Sums, than they would have had to demand a Preference upon the Tobaccos themselves, if, by arriving at some other Port than *Liverpool*, they had been attached by the Diligence of other Creditors.

It is therefore impossible to difference the present Case from the Decisions already quoted. It must be governed by the same Principle, that, so long as the Property remains with a Debtor, the Goods must be liable to the Diligence of any Creditor who uses proper Means to attach them. The Petitioners, indeed, alledge, that in the above Cases there was only a simple Mandate to the Trustee, without any express Assignment to the Creditor, to whom the Money was ordered to be paid, whereas, in the present Case, the notifying the Consignment, and the transmitting the Bill of Loading, was truly an Assignment sufficiently intimated, the Transmission of a Bill of Loading being, in the Practice of Merchants, held to give such a Right to the Consignee, if a Creditor, as to exclude the Revocation of the Consigner; but there is truly no room for this Distinction: In every Consignment whatever, the Bill of Loading is transmitted to the Consignees, and the Shipmaster is thereby taken bound to deliver the Goods to such Consignees or their Assigns. It is not, therefore, the Bill of Loading which gives a Right to the Consignee, when he is a Creditor, to exclude either the Revocation of the Consigner, or the Diligence of his Creditors. But it is the equitable Right of Retention which allows every Creditor to hold his Debtor's Goods, when he gets them lawfully into his Possession, until he be satisfied of his Debt. It is therefore in vain for the Petitioners to compare themselves with Creditors possessed of a compleat Assignment; an Assignment compleated by Intimation, divests the Cedent of the Property to all Intents and Purposes; but the Property of the Sums in question, is at this Hour in *Mackittrick and Company*, and the only Dispute is, which of his Creditors are best entitled to lay hold of that Property.



Property. If the Petitioners had got it into their Possession, they might have pleaded a Right of Retention; but, as they have not done so, the Respondents must be preferred, as the whole of them are either entitled to insist upon the Right of Retention, or have attached the Subject in a legal Manner by using Arrestments.

After what has been said, it seems scarcely necessary to take notice of the Decisions referred to in the Petition. The Case of *Sinclair contra Sommervell* is not in the smallest Degree applicable to the present Question; and, as to the Cases of *Ogilvie contra Ker*, and *Supplicants contra Nimmo*, where it was found, that a Purchaser's being taken bound by the Minute of Sale, to pay the Price to a Creditor of the Seller, was not a simple Mandate, but a Delegation, which gave a Right to the Creditor, and could not be recalled by the Seller; the Minute of Sale was, in effect, an Assignment to the Price to that particular Creditor, which required no Intimation, as being necessarily known to the Purchaser: But it surely cannot be pretended, that the Bill of Lading, which was signed by the Ship-master, could have that Effect, because it was no more than what is always done in the ordinary Course of Business. The Ship-master, although he had the Custody of the Tobacco's, was not Debtor in any Shape to the Consigner, and, consequently, no Delegation could arise from any Transaction with him in the Course of his Profession, he was no more than a mere Carrier, and, of consequence, the Goods sent by him must have remained subject to the Diligence of the Sender's Creditors, until they were delivered over to the Person to whom they were sent. The same Observations will likewise serve as an Answer to the Decision in the Competition betwixt *Goldie of Haughyet* and Mr. *Andrew Aitken*. The Lands were there sold, *ex proposito*, to pay certain Creditors. The Back-bond, granted by the Trustee, was equal to an intimated Assignment. The Price was in the Trustee's Hands, not for Behoof of the Dis-

E

poner,



poner, but his Creditors, and, on that account, could not be carried by a Confirmation. But, in the present Case, nothing further passed betwixt *Mackittrick* and Company and the Ship-master, than would have happened although the Petitioners had not been one single Farthing in Advance to that Company.

The only other Decision mentioned by the Petitioners, is the Case of the Creditors of *Macfarlane*, upon which indeed they lay great Stress; but that Case was of a very different Nature from the present; *Macfarlane*, a Merchant in *St. Christophers*, sent home a Parcel of Sugars, for the sole Purpose of paying certain Creditors: These Sugars were consigned not to his usual Correspondent, but to *James King*, Merchant in *Port-Glasgow*, with whom he had seldom or never before had any Connexion; he wrote to *King*, desiring him to apply the Proceeds accordingly, and annexed to his Letter a List of these Creditors, mentioning the precise Sum to be paid to each. He likewise wrote to the Creditors themselves to apply to *King* for their Payment, and, as soon as the Vessel and Cargo arrived, *King* intimated to them his having received the Sugars, and promised to make Payment as soon as he should be in Cash. After all this, Arrestments were used in *King's* Hands, but the Creditors, for Payment of whose Debts the Cargo was expressly consigned, were preferred. It is needless to use many Words to shew your Lordships that this Case was very different from the present. *King* was, properly speaking, a Trustee for the Creditors, for whose Payment the Sugars were destined to *Macfarlane*; and the Moment they came into his Hands, they were considered to be in the same Situation as if they had been received by the Creditors themselves. *Macfarlane* could not thereafter recal the Goods out of *King's* Hands; he had appropriated them to a certain Purpose; he sent them to a Trustee to be applied to that Purpose; and, when they arrived in that Trustee's Hands, he was then completely



completely denuded of the Property, which was thereafter held by the Trustee for the Behoof of the Creditors, to whose Payment they had been appropriated. The Conveyance was then completed by Delivery; and therefore it was noways improper to prefer these Creditors to the Persons who had arrested in Mr. *King's* Hands. But in the present Case, there is no Evidence that the Goods were particularly destined for Payment of the Debt due to the Consignees. On the contrary the Marks upon the Bill of Loading were the initial Letters of the Names of the different Partners, viz. *Mackittrick*, *Macharg*, and *Ballantyne*. And even supposing the Destination to have been ever so well ascertained, it could be of no Avail, because neither the Goods, nor the Surrogatum, which is come in place of them, ever came to the Possession of the Persons, to the Payment of whose Debt they are supposed to have been destined.

There was indeed a Judgment lately pronounced by your Lordships, highly in favour of the Respondents Plea, in the Question betwixt *Robert Arthur* and Messieurs *Hastie* and *Jamieson*. The Petitioners seem to be aware of this Decision, and have therefore endeavoured to explain it away. The Respondents are informed that it is again brought under your Lordships Review, and on that account it would be improper to enter into its particular Circumstances. They shall therefore only observe, that, in that Case, the Goods remitted from abroad were sent home by the *American* Merchant to re-imburse his Correspondents at *Glasgow*, in consequence of a written Contract and Agreement, and with a professed and clear Intention of its being applied to the Behoof of these Correspondents, and that the Arrestments upon which Mr. *Arthur* was preferred, were not laid on till after the Vessel had arrived at her Port of Destination, and the Bill of Loading transmitted home, and after one of the Gentlemen, to whom the Ship and Cargo were consigned, had actually been on board of



of her, and given Directions to the Shipmaster with regard to both. The Petitioners, when mentioning this Case, say, that *Dunlop*, the Common-debitor, industriously delayed and avoided the Payment of Debts due for Goods sent out several Years before, in what he called his *old Concern*, and most improperly endeavoured to put the Proceeds thereof into the Possession of his *new Concern*, *Hastie* and *Jamieson*, and that Mr. *Arthur*, one of the Creditors in the *old Concern*, having, in these Circumstances, used Arrestments to attach the Ship and Cargo, which he sent to these Gentlemen, he was properly preferred to them. Now the same Thing takes place in the present Case ; *Mackittrick* and Company were owing many thousand Pounds at *Glasgow*, their *old Concern*, but made all their Remittances, which must have arose from the Proceeds of the Moneys so due by them at *Glasgow*, to Messieurs *Clay* and *Midgley*, of *Liverpool*, their *new Concern* ; and, therefore, upon the same Principles, the Diligence used by the Respondents must intitle them to a Preference over the Petitioners.

The Respondents think it unnecessary to detain your Lordships longer. The Petitioners talk much of the Consequences that may accrue to Commerce, if Persons who send out Goods to *America* are not to be secured in the Returns made for these Goods ; but they seem not to be perfectly aware, how these Consequences may strike ; for, surely, if a Bill of Loading, which does not alter the Property, can convey such a Right or Hypothec, as to render all legal Diligence of no Avail, the Consequence must be ruinous to Trade. Every Merchant in *America*, the Bulk of whom are deeply indebted at home, would have it in his Power to transmit, with Safety, the whole of his Effects to one or more favourite Creditors, to the utter Disappointment of all the rest. It would, surely, appear very absurd, if a Mandate to a Carrier to deliver Goods from a Debtor to a certain Creditor, at a Distance,



stance, was to protect these Goods from Poinding or Arrestments, at any Time before they were actually delivered ; and a Bill of Lading is, in the View of Law, no better than such Mandate. If the Safety of Commerce is to be taken into Consideration, it is highly expedient to allow free Course to the legal Execution of Diligence, and to put the same beyond the Reach and Power of Debtors, who, in some Cases, may mean well, but, in the general, are presumed to collude or favour particular Creditors ; and, therefore, as the Respondents Claim of Preference stands on the Diligences of the Law, and not on the arbitrary Disposal of the Debtor, it is hoped that your Lordships will have no Hesitation of adhering to your former Interlocutor.

*In respect whereof, &c.*

ALEX. WIGHT.







